No. 6405

United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,
Attorneys for Appellant.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Appellee.

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STATEMENT

This is a transitory action for damages for the breach of a mutual life insurance policy issued by the Appellee to Appellant. The policy, a copy of which is attached to the Amended Complaint (page 96-116 Transcript), contains a provision for the payment to the assured of a certain surrender value in German marks upon the surrender of the policy after a certain period. The Amended Complaint alleges a tender of a surrender of the policy within the time prescribed by the policy, a demand for payment, and a refusal and failure of defendant to make the payment required by the policy, and that defendant repudiated the contract and refused to be bound thereby. Inasmuch as an American court cannot compel a payment in German marks, as provided for in the policy, but can only make an award in American dollars, damages in such dollars are alleged and sought for the failure of defendant to perform its contract and for its repudiation of the contract.

The action was begun in the Circuit Court of the State of Oregon, for Multnomah County, and thence removed by defendant to the District Court of the United States for the District of Oregon.

In the petition for removal (page 3-4 Trans. Rec.), it is alleged that plaintiff is an alien—a citizen, subject and resident of Germany—and that defendant is a citizen of the State of New York in the United States, viz.; a corporation organized under the laws of the State of New York. Said petition further al-

leges that the said Federal Court had jurisdiction of the cause, the same being a controversy between an alien and a citizen.

In the Amended Complaint it is alleged that defendant is a corporation organized and existing under the laws of the State of New York, and, therefore, a citizen of that State (page 88 Trans. Rec.).

It, therefore, appears on the face of the record that this is a controversy between an alien on one side and a citizen of the State of New York on the other.

After the issues had been completely made up and drawn by the pleadings in the lower court, the defendant filed a motion to dismiss the action on the ground that the lower court had no jurisdiction thereof, or, in the alternative, if the court did have jurisdiction, that the court exercise its discretion by refusing to entertain the action. (Page 147 Trans. Rec.).

On December 1, 1930, the lower court ruled and held that while it had jurisdiction of the cause, yet it also had a discretion as to whether or not it would retain that jurisdiction or whether it would dismiss the action. And said court further exercised said alleged discretion by making and entering a judgment dismissing the action.

The sole and only question presented by this appeal is the correctness of the lower court's decision and judgment that said Court had a discretion as to whether or not jurisdiction should be retained or rejected. The several assignments of error raise and

present no other or different question than the foregoing. The assignments of error assert that the lower court had jurisdiction of the cause imposed upon it by positive law, viz.: Section 41 of Title 28 U. S. C. A., being an Act of Congress, and that said Court had no discretion whatever to decline or refuse that jurisdiction, and that it was its duty to hear and determine the issues of the cause.

SPECIFICATION OF ERRORS

Appellant relies upon the following errors, which are assigned in the Assignment of Errors (page 56 Trans. Rec.), to-wit:

I

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said Court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II

That the United States District Court for the District of Oregon erred in holding and adjudging that said Court had a discretion as to whether or not it would retain jurisdiction of said cause.

III

That the United States District Court for the District of Oregon erred in rendering and entering said judgment of the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on the merits.

ARGUMENT

The lower court, while holding it had jurisdiction of the cause, erroneously further held that it had a discretion as to whether or not it would retain and exercise that jurisdiction.

The Court was lead into that error by a citation of authorities, which said Court followed, in cases where the Court's jurisdiction was not fixed by positive law, but was a matter of comity. Jurisdiction, based solely on comity, is a matter of favor, or as counsel aptly said, of hospitality. And favor or hospitality may or may not be extended in the discretion of the Court. And all the cases upon which the lower court based its ruling are cases of that kind. The principal decision relied on by the lower court is the case of the Belgeland, 114 U. S. 188, in which all the parties, plaintiffs and defendants, were aliens, and therefore, there was no positive law imposing jurisdiction upon the Court, and the only jurisdiction that existed was that of favor or hospitality, i. e., comity.

There is no jurisdiction more positively or directly vested in and imposed upon the federal courts than

is vested and imposed in this case. It is not only statutory but also constitutional.

The United States Constitution, Article III, Section 2, reads as follows:

> "The judicial power shall extend to all cases in law and equity.....between a State, *or the citizens* thereof, and foreign States, *citizens or subjects.*"

The Act of Congress, prescribing the jurisdiction of the District Courts, pursuant to said constitutional provision, provides as follows:

> "The District Courts shall have original jurisdiction as follows:
>
> 1. First: of all suits of a civil nature, at common law or in equity.....where the matter in controversy exceeds $3000.00 and.....(c) is between citizens of a state and foreign states, citizens, or subjects."
>
> Section 41, Title 28 U. S. C. A.

This Constitutional provision and Act of Congress not only, by positive law, imposes jurisdiction upon the District Court, but it manifestly grants the right to a citizen to prosecute and maintain an action in such Court against an alien, *and also grants to an alien a right to institute and maintain an action in said Court against a citizen.*

The refusal of the lower court to entertain this action is a denial to the plaintiff of a right which is expressly granted to him by the Constitution and by said Act of Congress.

To comprehend and realize how far reaching and erroneous is the lower court's ruling, it must be considered that if the Court has a discretion as to whether or not it will exercise jurisdiction in this case, it must have a similar discretion in every case in which jurisdiction is imposed upon it by said Act of Congress. In other words, there is not and cannot be, if this judgment be right, any case which the District Court must entertain, but jurisdiction in every case depends solely upon the idiosyncracies and peculiar whims of the particular judge before whom it may be brought.

It is a long-established rule that comity in every case must yield and give way to positive law.

Where jurisdiction is imposed by positive law, the Court has no discretion whatever and must proceed in a matter properly before it.

Cohen vs. Virginia, 19 U. S. (6 Wheat.) 264, 403.

Wilcox vs. Consol. Gas Co., 212 U. S. 19.

Second Employer's Liability Cases, 223 U. S. 158.

Kline vs. Burke Constr. Co., 260 U. S. 226, 67 L. Ed. 226.

Raich vs. Truax, 219 Fed. 273, affd. 239 U. S. 33.

Southern Cal. Tel. Co. vs. Hopkins, 13 Fed. (2nd), 814-820.

Norris vs. Illinois Co., 18 Fed. (2nd) 584.

Re Thirty-fourth St. R. R. Co., 102 N. Y. 343.

Crane etc. Co. vs. R. R. Co., 131 Misc. 71, 225 N. Y. S. 775.

State vs. Grimm, 239 Mo. 135, 143 S. W. 483.

Kimball vs. Neal, 44 Vt. 567.

Hagerstown B. Co. vs. Gates, 117 Md. 348, 83 At. 570.

This court has recently decided this point adversely to the lower court's ruling in a very similar case, where the district court had held it had jurisdiction but exercised a discretion to decline to entertain the case. Judge Hunt, it seems to us, very clearly put an end to appellee's contention in the following words:

> "As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise jurisdiction. Decision that there was power to hear and determine *removed any question of discretion* and left a bounden duty to proceed to a decree." 13 Fed (2) 814-8

Raich vs. Truax, 219 Fed. 273-284, is an action by an alien against a citizen in which a motion to dismiss was denied by the court on the ground that the jurisdiction was imposed by positive law and the court had no discretion whatever to decline to hear the case but was in duty bound to retain the case, citing Cohen vs. Virginia, supra. This case was affirmed in 239 U. S. 33, but without opinion on this point.

In Wilcox vs. Consol. Gas Co., supra, Mr. Justice Peckham very clearly states the rule as follows:

> "They assume to criticize the Court for tak-

ing jurisdiction of this case, as precipitate, *as if it were a question of discretion or comity,* whether or not the Court should have heard the case. *On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."*

In Second Employer's Liability cases, 223 U. S. 1-58, the court said:

> "The existence of the jurisdiction creates an implication to exercise it, and that its exercise may be onerous does not militate against the implication."

Justice Andrews of the Court of Appeals of New York also concisely states the doctrine as follows:

> "When either by Constitution, or by statute, jurisdiction is conferred upon a court, the Court cannot entertain or decline jurisdiction in its discretion. It is bound to exercise it when the case arises and its exercise invoked by a party interested and having the right to make the application."
>
> Re Thirty-fourth St. R. R. Co., 102 N. Y. 343-353.

An examination of the authorities cited and relied on by the lower court will demonstrate at once that none of them is a case where the jurisdiction was imposed by positive law—by a constitutional or statutory enactment. They fall into two classes: Federal decisions where the parties on both sides of the controversy were all aliens and therefore the jurisdiction depended solely on comity; and state decisions, either

in state courts, or on appeal from such state courts, where all the parties were non-residents of the state, and there was no state statute vesting or imposing jurisdiction.

This record shows the following facts: The cause of action is a transitory one; the amount in controversy exceeds $3000.00; the plaintiff is an alien, a citizen and subject of a foreign state, viz: Germany; and the defendant is a corporation of the state of New York and a citizen of the United States, and is doing business in Oregon according to the laws thereof. These facts bring the case squarely within Section 41, Title 28, sub. 1, clause (c) U. S. C. A., which imposes jurisdiction upon the district court and confers upon plaintiff the right to sue and maintain the action in the district court.

Since the decision of the Wilcox case in the United States supreme court, and the Southern California Tel. Co. case in this court, there does not appear to be any reasonable ground of debate as to whether or not a court has any discretion in the matter of exercising jurisdiction in a case where the jurisdiction is imposed upon and vested in the court by positive law.

Neither can there be any doubt but that the provisions of Sections 41 and 71, U. S. C. A., imposes upon the lower court jurisdiction of this action.

Where there is a positive statute conferring and imposing jurisdiction, there is, of course, by reason of the statute, a fixed rule governing the jurisdiction. And it follows that in such case there can be no power of choice or discretion lodged in the court.

In Gregonis vs. P. & R. Coal & Ice Co., 235 N. Y. 152—a case cited and relied on by the lower court, but which does not sustain the lower court's view—the court said:

> "Discretion implies a power to make a choice."

In the recent decision of Langnes vs. Green, decided by the U. S. supreme court on February 24, 1931, on certiorari from this court, Justice Sutherland said:

> "The term 'discretion' denotes the absence of a hard and fast rule."

When there is a statute which imposes jurisdiction, there is a "hard and fast rule," and there is no power to make a choice. When there is no"hard and fast rule," then there is a power to choose and a discretion. It is a contradiction in terms and principles to say that the act of congress has conferred jurisdiction, but that the court has, nevertheless, a discretion as to whether or not it will exercise such jurisdiction.

The lower court has erroneously exercised a discretion and a choice in this case although it is governed by a "hard and fast rule," viz: The act of congress which imposes jurisdiction on the district court. And in doing this the lower court mistakenly relied upon decisions in cases which are not controlled by any "hard and fast rule," but, instead, are cases where the jurisdiction is based solely upon the principle of comity.

We shall presently refer to the authorities cited in the lower court's opinion and show that they are all cases of the character last above referred to.

It has been suggested, however, that a want of jurisdiction in the district court of Oregon arises under Section 112 U. S. C. A. from the fact that the place of residence or domicile of defendant is in the state of New York, and that, therefore, original jurisdiction of the cause would be in the district court for the District of New York. If this were true, manifestly, the lower court would have no power to dismiss the action, but could only remand it to the state court from whence it was removed.

There is, however, nothing in the suggestion, and the provisions of Section 112 U. S. C. A. have been judicially determined to be not jurisdictional.

The provision of said Section 112, which has been referred to, is as follows:

> "and, except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It was formerly assumed that Ex parte Wisner, 203 U. S. 449, 27 S. Ct. 150, was authority for the proposition that a compliance with said Section 112 was jurisdictional, so that a cause commenced against a non-resident in a state court could not lawfully be removed to the federal court of that state, but must be remanded to the state court for want of jurisdiction in that federal court. It was also thought that in the case of In Re Moore, 209, U. S. 490, 28 S. Ct. 585, that rule was somewhat modified.

Several decisions were rendered in the lower federal courts in which cases of this kind were remanded to the state court for want of jurisdiction. An example may be found in the case of Decker vs. Southern Co., 189 Fed. 224.

But the mooted question was finally set at rest, first by this court, and afterwards by the supreme court of the United States.

This court in Kantalla Co. vs. Rones, 186 Fed. 30, settled the point that the provisions of Section 112 were not jurisdictional but were for the benefit of the defendant, and could be waived by defendant, and were in fact waived by defendant when defendant sought the jurisdiction of the federal court by removing the cause thereto.

This decision preceded by half a decade the action of the United States supreme court, but when the question did arise in that court it was decided in precisely the same way as this court had formerly announced.

Lee vs. Chesapeake Co., 260 U. S. 653, 43 S. Ct. 230.

General Inv. Co. vs. Lake Shore etc. Co., 260 U. S. 261, 43 S. Ct. 106.

Great Northern Co. vs. Galbreath Co., 271 U. S. 99, 46 S. Ct. 439.

Note 76 to Section 71, Title 28 U. S. C. A.

It is now established both by the U. S. Supreme Court and by this court, that a compliance with said Section 112 is not jurisdictional; that the provisions

of that section are for the benefit of defendant, who may waive a compliance therewith; and that defendant, by removing a cause to a federal court of a district other than that of his domicile, does waive the requirement that he must be sued only in the district whereof he is an inhabitant.

The courts have never looked with favor upon a suitor who invokes the jurisdiction of a court and then makes objection that such court has no jurisdiction to entertain the cause.

In Fisher vs. Shropshire, 147 U. S. 133, 13 S. Ct. 201, it is said:

> "The suit was removed into the Circuit Court of the United States by defendant John Lyle and having done that, he then contended that the Court had no jurisdiction because George Lyle was an indispensable party defendant and he was a citizen of the same State as complainants. *We do not think this will do....we are not prepared to hold that the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it.*"

In the case of In Re Moore, 209 U. S. 490, 28 Sup. Ct. 585, Justice Brewer said:

> "That defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State Court to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had."

In the present case the defendant filed a petition for removal in which it alleged the existence of all

essential facts to invoke the jurisdiction of the lower court and in which it alleged that the lower court had jurisdiction of the case, and pursuant to such petition this case was removed to the lower court and its jurisdiction was invoked. Thereupon the defendant, having the case lodged in the lower court, filed a motion to dismiss it—not to remand it to the court from whence it was removed, but to dismiss it absolutely—on the ground that the lower court was without jurisdiction to hear it, or, at least, should not, in the exercise of a discretion, entertain the case at all. The success of that motion was a shock to our sense of equity and fairness.

It seems to us that if the district court is to possess the power of taking a case from the state court, which had jurisdiction of it (State ex. rel. vs. Tazwell, 125 Or. 528), for the purpose of absolutely dismissing it, without trial on the merits, on the ground of want of jurisdiction, such power should appear by express grant in some act of congress. There is no such power. If the lower court had no jurisdiction, or declined to entertain the case, it should remand it to the court from whence it was removed.

At this point we deem it proper to substantiate our statement that the authorities relied on by the lower court do not apply to a case where the jurisdiction is conferred by positive law—by a statute or a constitution—but apply only in admiralty and other cases where the jurisdiction depends solely on the principle of comity. The following is a complete list

of all the decisions cited and relied on by the lower court, viz.:

1. Cuba R. R. vs. Crosby, 222 U. S. 473.
2. Pietrario vs. N. J. & H. R. Co, 197 N Y. 434.
3. Gregonis vs. P. & R. Coal & Ice Co., 235 N. Y. 152.
4. Stewart vs. Litchenberg, 86 So. 734.
5. Smith vs. Mutual Life Ins. Co., 96 Mass. 336.
6. Telephone Co. vs. DuBois, 165 Mass. 117. 343.
7. Collard vs. Beach, 81 App. Div. (N. Y.) 582.
8. Great Western Ry. vs. Miller, 19 Mich. 305.
9. Disconto Gesellschaft vs. Umbreit, 127 Wis. 651.
10. The Belgeland, 114 U. S. 355.
11. Charter Shipping Co. vs. Bowring, 281 U. S. 515.
12. Higgins vs. N. Y. L. Ins. Co., 220 App. Div. (N. Y.) 620.
13. Van Niessen-Stone vs. N. Y. L. Ins. Co. (Not reported.)
14. Opinion of Judge Tucker of the Oregon Circuit Court.

The first of these decisions—Cuba R. R. vs. Crosby—has no bearing on the question involved here, because in that case no discretion was exercised or the exercise of it requested or denied. Jurisdiction was taken and the cause was tried on its merits, although it is a controversy between aliens. The supreme court did not decide whether or not the lower court had a discretion, but passed upon

the correctness of a ruling of the lower court in instructing the jury. The tort, which was the subject of the action, occurred in Cuba. The laws of Cuba giving a cause of action for the tort had not been proven in the case; and the lower court instructed the jury that the laws of Cuba would be presumed to be the same as those of the forum. This the supreme court said was error, under the well settled rule that such presumption exists only as between states, but not as between a state and a foreign country. There is nothing whatever in this decision which sustains the lower court in refusing jurisdiction in a case where the jurisdiction is imposed by positive law.

The second case—Pietrario vs. N. J. & H. R. Co.—concerns a controversy between non-residents of New York, on a cause of action arising outside of that state, and there was no statute conferring jurisdiction on the courts of New York. The jurisdiction was based on comity and not by positive law. The decision would be applicable if the *state court* here had exercised a discretion to dismiss the action, and there was no Oregon statute imposing jurisdiction on the Oregon state court. But the state court did not take any such action, and the fact is there is an Oregon statute imposing jurisdiction on the Oregon courts, as this court has already decided. The question before this court is whether the *federal district court* below may decline jurisdiction, and not what the *state court* might have done, but did not do.

The third case—the Gregonis case—holds, as we view it, exactly contrary to the lower court's ruling.

That decision is to the effect that the lower court had no discretion or power to dismiss the cause, because the jurisdiction was conferred by positive law. One of the parties was resident of New York. This sustains our view. The defendant here is a citizen and resident of the United States. If Judge Bean is right in ruling that the district court of the United States has a discretion to decline jurisdiction of a cause where the defendant is a citizen and resident of the United States, and there is an act of congress conferring jurisdiction in such case, then the court of appeals in the Gregonis case should have ruled that the New York lower court had a similar discretion in that case. That court, however, correctly ruled that the statute disposed of the discretion and the court had no power to choose. And we say again that no case can be found which holds that a court upon which jurisdiction is conferred by positive law, has any power to decline jurisdiction.

The fourth case—Stewart vs. Litchenberg—is a Louisiana decision in a controversy between residents of the state of Nebraska, upon a cause arising in Nebraska, and there was no statute conferring jurisdiction upon the Louisiana courts. Another case of comity.

The fifth case—Smith vs. Mutual Life Ins. Co.—is also a controversy between non-residents. Plaintiff was a resident of Alabama and defendant a New York corporation. The cause arose outside of the state of the forum, and there was no statute conferring jurisdiction. A case of comity.

The sixth case—Telephone Co. vs. DuBois—is also a controversy between non-residents and there was no statute conferring jurisdiction. The court in that case expressly said that the jurisdiction was based on comity.

The seventh case—Collard vs. Beach—is another case of the same kind. Both parties were non-residents and there was no statute conferring jurisdiction. Another comity case.

The eighth case—Great Western Ry. vs. Miller—is an action by a resident of Canada against a Canadian corporation, on a cause which arose in Canada, and there was no statute conferring jurisdiction. Still another comity case.

The ninth case—Disconto Gesellschaft vs. Umbreit—which was affirmed by the U. S. supreme court in 208 U. S. 570, 52 L. Ed. 625, is another comity case. All parties were aliens and there was no statute conferring jurisdiction.

The tenth case—The Belgeland—is an admiralty case in which all the parties are aliens and there was no statute conferring jurisdiction. The judiciary act of congress does not confer jurisdiction on the district courts in cases between aliens. This is another comity case.

The eleventh case—Charter Shipping Co. vs. Bowring—is another admiralty case between aliens, and the jurisdiction was based solely on comity.

The twelfth case—Higgins case—is a memorandum decision without opinion or statement of facts.

The thirteenth case—Van Niessen-Stone case—is not even reported.

Not knowing officially anything about these last two cases we can make no comment further than to say that if they do in fact sustain the doctrine that a court upon which a controlling statute has imposed jurisdiction, may retain or refuse that jurisdiction in its discretion, such decisions are of no weight whatever. They are decisions by an inferior court directly opposed to the rulings of the court of last resort, the court of appeals, in the Gregonis case and in a very recent case decided February 10, 1931, viz: The case of The Matter of the People by James A. Beha, in re the claim of G. Frank Dougherty. In the last mentioned decision the court of appeals reversed the lower court for dismissing the claim of an alien on an insurance policy issued in Russia. And they are also opposed to Justice Andrew's decision in 102 N. Y. 353.

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In the cases relied on by the lower court none of the parties were residents within the jurisdiction of the court. In the federal decisions the parties were aliens. In the state court cases the parties were non-residents of the state. This case involves the jurisdiction of the federal district court, whose power extends throughout the whole United States. The lower court seems to have overlooked the fact that the defendant is a citizen and resident within the jurisdiction of the district court, and also the fact that congress has by express act conferred jurisdiction on the lower court. The cases cited would apply if both the

parties here were aliens. But such is not the case. The defendant is a citizen of the United States.

We now come to the fourteenth and last authority relied on by the lower court, i. e., the opinion of Judge Tucker in the case of Kahn vs. N. Y. L. Ins. Co.

The lower court's opinion very clearly shows that the distinction between jurisdiction imposed by positive law and jurisdiction based on comity was overlooked and not considered. It is only in the latter instance that a court has a discretion, and it has none whatever in the former. Yet the lower court assumed in this case, which is a case where the jurisdiction is imposed by positive law, a discretion that only exists in cases where the jurisdiction is a matter of comity. The lower court assumed it has a discretion in every case that might be brought before it as to whether or not it would entertain the case, because there can be no case where the jurisdiction is more clearly imposed and vested by positive law than in this one.

The failure of the lower court to recognize or consider the distinction between the vesting of jurisdiction by positive law, and the exercising of it as a matter of comity, is clearly seen in the citation of Judge Tucker's opinion in the Kahn case. Judge Tucker marked and considered the distinction we have mentioned and expressly made his opinion dependent upon the fact that the case before him was entertained solely as a matter of comity and not because of positive law. In his opinion he said:

> "This action is entertained not upon the principles accorded to citizens of the United States by the fundamental law, but upon the principle of comity."

Judge Tucker's view was that the court had a discretion because the jurisdiction was solely a matter of comity, but the lower court enlarges upon that and assumes a discretion in a case where jurisdiction is imposed by positive law. Certainly Judge Tucker's opinion is no authority for that.

Whatever may be the fact in the Kahn case as to whether or not the jurisdiction was a matter of comity, Judge Tucker said that it was and his opinion is based entirely on that hypothesis. In that respect, however, Judge Tucker was wrong because at the very time he rendered his opinion he, or the court of which he was judge, was under mandate of the Oregon supreme court to try and determine the Kahn case upon its merits. State ex rel. vs. Tazwell, 125 Or. 528.

There can be no question but that the state court in this case had jurisdiction imposed by positive law. The action is a transitory one and both parties are non-residents of Oregon. In such cases Section 44 Oregon Laws (1920 Code) vests jurisdiction in the circuit court of any county in the state selected by the plainitff.

This court in the case of Denver, etc. Co. vs. Roller, 100 Fed. 738, construed a California statute identical with said Section 44 of the Oregon code, and held that it imposed on the California courts jurisdiction of

a transitory action wherein the parties on both sides were non-residents of the state.

But it is not a discretion in the state court which is the subject of this appeal. The state court did not assume any such discretion. The question is whether or not the district court below had a discretion to dismiss without trial on the merits an action which was properly before it wherein the controversy was between an alien on one side and a citizen of one of the United States on the other side, and the amount involved exceeded $3000.00 and the action was transitory in character.

The plaintiff has been granted, by the act of congress, a right to maintain his action in the district court, and to turn him out of court now with the injunction to commence his action in the New York district, is to deny him any right whatever and to deprive him of his cause of action. In the meantime the statute of limitations has run against his action, and it is cold comfort indeed to suggest that he now begin it in the district court for the district of New York by original process.

It is respectfully submitted that the judgment of the lower court should be reversed and a mandate be sent down to the court below requiring it to hear and determine this action on its merits.

Respectfully submitted,

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